No. 519

In the Supreme Court of the United States

OCTOBER TERM, 1960

DAVID L. RATKE AND MONROE CAINE, PETITIONERS

v.

HON. FRANK A. PICARD, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 21) is not yet reported. The opinion of the district court (Pet. 15-18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1960 (Pet. 21). A petition for rehearing was denied on October 10, 1960 (Pet. 22). The

petition for a writ of certiorari was filed on November 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly declined to review by mandamus the district court's exercise of discretion in denying an application to transfer the venue of a mail fraud prosecution.

RULE INVOLVED

Rule 21(b), F.R. Crim. Proc., provides:

> The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

STATEMENT

An eleven-count indictment returned in the District Court for the Eastern District of Michigan charged the petitioners and two others with mail fraud, in violation of 18 U.S.C. 1341 (Pet. 26-39). The indictment charged a scheme to defraud in the sale of a "Turbo Jet Converter" which it was advertised would enable purchasers to run their cars half on air. It was charged that as part of the scheme the

defendants sought to represent that the manufacturer was located in an automotive manufacturing city and engaged a secretarial service in Detroit, Michigan, to receive mail from purchasers addressed to Douglas Manufacturing Company and forward such mail to addresses in New York. The mailings charged were deposits in Detroit for delivery in New York. After the district court had denied defendants' application under Rule 21(b), F. R. Crim. Proc., for a change of venue to the Southern District of New York, the trial commenced in Detroit on May 23, 1960. On June 1, 1960, the court granted a mistrial on the ground that it had made an incorrect statement to the jury regarding a defense stipulation. The case was rescheduled for trial in October (Pet. 3-4).

On September 19, 1960, the petitioners and their co-defendants reapplied for a change of venue to the Southern District of New York. The district court found it unnecessary to resolve the question whether the proceeding was legally transferable under Rule 21(b) as charging an offense committed in more than one district, since it found that in any event a transfer would not be in the interests of justice (Pet. 16). It pointed out that there would be greater hardship and inconvenience to government witnesses who were innocent bystanders than to defense witnesses who, in most instances, were "character witnesses" who would not deem testifying for the defense an inconvenience, and that the hardship to the government would be "far greater necessitating a greater expense in transferring the books and records and all the documentary evidence to New York and to begin pro-

ceedings anew". It also pointed out that all the defendants said they wanted a "speedy trial", and that trial would be more expeditious in Michigan, for the authorities in New York could give "no promise * * * that the case would be tried within the near future" (Pet. 17, 18).

On September 21, 1960, petitioners made application in the court of appeals for a writ of mandamus to compel the trial judge to vacate the order denying the application for a change of venue "and to enter an order granting the same." On October 7, 1960, the court of appeals, in a unanimous and summary opinion, denied the petition (Pet. 21).

ARGUMENT

There is no occasion to consider whether the trial court erroneously exercised its discretion in denying the motion for a transfer of venue, as petitioner contends (Pet. 5-14), for the writ of certiorari is directed to the correctness of the ruling of the court of appeals which denied the petition for a writ of mandamus. That ruling was clearly proper, for the extraordinary relief by way of mandamus does not lie to review the mere exercise of discretion in denying an application for a transfer of venue. *Parr* v. *United States*, 351 U.S. 513, 520; see *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 382-383. This Court pointed out in *Parr* (351 U.S. 520-521):

> Here, the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary

writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals.

While this Court has held that mandamus may sometimes be used to review an interlocutory order on a clear showing of abuse or usurpation of judicial power (*La Buy* v. *Howes Leather Co.*, 352 U.S. 249), it made clear in that opinion that it was not holding that mandamus "is intended, or can be used, to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders" (352 U.S. at 255). The decision of the district court here does not present the extraordinary situation contemplated by *La Buy*, for the trial judge carefully weighed the considerations for and against transfer. Contrary to petitioner's contention (Pet. 4), the order denying the transfer was not based on the court's belief that there was no crime charged in New York. Although the court parenthetically noted that it believed that no crime was charged to have been committed in New York, it nevertheless found that it was unnecessary to resolve that question since the interests of justice militated against such a transfer in any event (Pet. 16-18). The present claim is only that this exercise of discretion as to what is in the "interests of justice" was erroneous. That kind of claim is reviewable on appeal from the final judgment, and not by mandamus. *Parr* v. *United States*, 351 U.S. 513, 520-521. See also, *Petition of Nelson*, 199 F. 2d 878 (C.A. 3).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1960.